IN THE

UNITED STATES SUPREME COURT

No. 76-5722

OCTOBER TERM 1976

RONALD M. SCHLEIS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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The petitioner, Ronald M. Schleis, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Opinion Below

The opinion of the Court of Appeals, not yet reported, is attached hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on October 21, 1976. This petition is filed within thirty days of that date.

Questions Presented

I. Whether a United States Marshal may lawfully apprehend and search a person solely because he appears to be intoxicated in a public place, a condition which violated no state or federal law?

II. Whether the warrantless and forcible opening of a briefcase at the police station while the owner is in custody is proper, where the owner had been apprehended for being intoxicated and frisked, the frisk resulting in the discovery of a small quantity of marijuana?

Constitutional Provisions Involved

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement

Ronald Schleis was charged with possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1). A motion to suppress evidence was denied; Mr. Schleis waived his right to jury trial and submitted the matter to the Court upon stipulated facts, whereupon a finding of guilty was entered, (Transcript of Trial, December 22 and 29, 1975, p. 17), and he was sentenced to fifteen years incarceration, plus a ten year special parole.

Leon Cheney, a deputy Marshal, and his family were at a restaurant in Burnsville, Minnesota, on November 17, 1974 at about 6:50 p.m., when Cheney noticed Schleis, walking in an unstable manner toward the restaurant. (Transcript of Suppression Hearing, hereafter T., p. 6). In the restaurant foyer Schleis went to a telephone and made a telephone call which was not completed; Cheney thought he saw him "fumble" with coins for the phone. (T., p. 7).

Cheney approached Schleis at the telephone, and noticed his eyes appeared dilated, but detected no odor of alcohol; he lit a butane cigarette lighter and observed no reaction in Schleis's eyes. (T., p. 9). In Cheney's opinion Schleis was "blitzed," or "stoned," meaning under the influence of something. (T., pp. 9-10).

Cheney asked Schleis to identify himself, but received no response, except that he was a "farmer." He produced his credentials, and read Schleis a "Miranda" warning from a card, (T., p. 12), and then "escorted" Schleis outside. (T., pp. 9-10), where he placed Schleis's hands on the hood of a car and patted him down for weapons. (T., pp. 13-14). He found none, but removed Schleis's billfold and threw it onto the hood of the car; it opened, disclosing a large amount of currency and what appeared to be a small bag of marijuana. (T., p. 14). Schleis was carrying a briefcase, which Cheney took from him.

Cheney, who had Schleis in custody for "detoxification," then directed someone to call the Burnsville police; officer Van Hoof arrived shortly. (T., pp. 19-20). Van Hoof told Schleis he was going to "take him in for detoxification," until Cheney pointed to the suspected marijuana, whereupon Van Hoff told Schleis he was under arrest for possession of that, and handcuffed him. (T., pp. 20-21). A car without lights was seen passing several times. (T., p. 21). Schleis was taken to the Burnsville jail and placed in a holding cell; his jacket was taken and searched, yielding some $700, a vial with a crystalline substance (suspected cocaine) and some blue tablets. (T., p. 23).

The locked briefcase was forcibly opened with a screwdriver; it contained approximately a pound of cocaine, $2500 or $2600 and a half gallon jug of orange juice. (T., pp. 24-25, 41). No warrant was sought or obtained authorizing search of the briefcase, nor was Schleis's permission asked. (T., pp. 39, 41, 60). There was an evidence locker available, but it was not used for the briefcase. (T., p. 60).

Cheney testified he was acting pursuant to a statute which authorized U. S. Marshals to assume the duties of sheriffs and to "enforce state and local laws" as well as federal laws. (T., pp. 27-28). Although he had, he said, detained Schleis for detoxification, he did not know if he was ever administered a test for intoxication or taken to a detoxification center. (T., pp. 38-39, 60). Cheney acknowledged that Minnesota law "could be" that a person taken into custody for detoxification shall not be taken to a jail facility. (T., p. 39).

Burnsville officer Van Hoof testified that when he arrived at the restaurant, in response to a call to pick up a drunk, he recognized Schleis as someone who "had been pointed out" to him a year earlier as being "involved in dealing with drugs." (T., p. 48). Schleis appeared under the influence of something, he said, and he could obtain no information from him. (T., pp. 48-49).

Van Hoof admitted there was confusion in his mind as to how to proceed with Schleis, whether as a detoxification case or as a criminal one, and he described both procedures. (T., pp. 49-52). Van Hoof contended that the briefcase was forcibly opened in order to inventory its then unknown contents for the protection of Mr. Schleis. (T., pp. 51-52, 64).

In fact, although Schleis's assertedly intoxicated condition had not changed, he was never taken to a detoxification or medical facility although it was Van Hoof's inclination to do so; rather an assistant United States Attorney arrived on the scene, together with Drug Enforcement Administration agents, and they took Schleis and his briefcase away. (T., pp. 54-55).

Some days later Douglas Thomson, an attorney retained by Mr. Schleis, was outside the restaurant taking photographs; Cheney happened to be there at the time and someone told him that someone was "fooling" with his car; Cheney obtained the license of Thomson's departing car and called the Burnsville police, who stopped Thomson. The police released Thomson when Cheney confirmed that he was Schleis's attorney. (T., pp. 36-38, 45-46). Cheney testified that before this episode he had received a number of telephone calls in which the calling party would simply hang up without speaking. (T., p. 44).

The trial Court denied the motion to suppress without written opinion and the Court of Appeals affirmed, finding the initial detention and frisk a valid "investigatory stop," and the later opening of the briefcase was reasonable.

Reasons for Granting the Writ

I. THE FEDERAL MARSHAL WHO TOOK MR. SCHLEIS INTO CUSTODY AND SEARCHED HIM OBSERVED NO CRIME (FEDERAL OR STATE), HAD NO INFORMATION THAT ANY CRIME (FEDERAL OR STATE) HAD BEEN COMMITTED, NO PROBABLE CAUSE THAT SCHLEIS HAD COMMITTED ANY CRIME (FEDERAL OR STATE), NO OTHER GROUNDS TO JUSTIFY AN INVESTIGATIVE DETENTION OR A STOP AND FRISK, NO AUTHORITY TO DETAIN OR SEARCH HIM BECAUSE OF INTOXICATION, NOR ANY OTHER JUSTIFICATION FOR RESTRAINING AND SEARCHING HIM; ACCORDINGLY THE WARRANTLESS ARREST AND SEARCHES AND SEIZURES OF HIS PERSON AND BRIEFCASE WERE UNLAWFUL.

The arrest, searches and seizures were all without benefit of warrants, and their validity must therefore be determined under state law within federal Constitutional boundaries. United States v. DiRe, 332 U.S. 581, 589 (1948); United States v. Turk, 429 F.2d 1327, 1330 (8th Cir. 1970). In Minnesota a warrantless arrest is considered "dangerous to the citizen," Wahl v. Walton, 30 Minn. 506, 16 N.W. 397 (1883), and "presumptively invalid," and the burden is upon the prosecution to justify it. State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969). Minnesota Statutes §629.34 and §629.37 allow warrantless arrests by peace officers and private persons for (1) misdemeanors committed in the arresting person's presence or (2) felonies upon probable cause. Since by statute drunkenness in public or private is specifically made not a crime in Minnesota, Minn. Stat. §340.961, and since deputy Cheney neither observed any other offense nor had probable cause to believe Mr. Schleis had committed any felony, the arrest cannot be supported under the arrest statutes.

Nor do the Minnesota Statutes for the protection of insane and inebriate persons support the detention. Minn. Stat. §253A.04 subd. 2 provides in part:

> A peace or health officer or a person working under such officer's supervision, may take a person who is intoxicated in public into custody and transport him to a licensed hospital, mental health center facility or a person on the staff of a state licensed or approved program equipped to treat drug dependent persons. Provided, if such person is not endangering himself or any other person or property the peace or health officer may transport the person to his home.

Minn. Stat. §253A.02 subd. 15 provides:

> "Peace officer" means a sheriff, or municipal or other local police officer, or a state highway patrol officer when engaged in the authorized duties of his office.

An inebriate person is defined in Minn. Stat. §253A.02 subd. 4:

> "Inebriate person" means any person determined as being incapable of managing himself or his affairs by reason of the habitual and excessive use of intoxicating liquors, narcotics, or other drugs. (Emphasis supplied)

And Minn. Stat. §253A.10 subd. 1 provides:

> Except when ordered by the court, no person apprehended, detained, or hospitalized as mentally ill, mentally deficient, or inebriate under any provision of sections 253A.01 or 253A.21 shall be confined in jail or in any penal or correctional institution.

Minnesota law thus allows detention of intoxicated persons in certain circumstances, but it quite carefully and specifically limits the authority to do so to peace and health officers, and allows transportation only to medical facilities and not to jails; it authorizes no frisk or search.

It is clear that the entire machinery of the Minnesota hospitalization and commitment act, Minn. Stat. Chapter 253A, is designed for the protection and treatment of habitual abusers of alcohol and drugs, not for the apprehension of occasionally intoxicated persons, certainly not as an aid to criminal law enforcement. (Indeed, Minn. Stat. §253A.09 subd. 1(d) directs that transportation of persons under the act be by non-uniformed officers in unmarked cars, absent a court order to the contrary.)

Therefore the language of the act cannot avail the government. But, deputy Cheney offered, a federal statute, (28 U.S.C. §570, presumably), in effect makes him a de facto sheriff and therefore, the argument seems to run, he was indeed a "peace officer" under Minnesota law and authorized to act under the aforementioned provisions. The federal statute, however, does no such thing (and it is doubtful whether under principles of federalism such a plenary intrusion into state law enforcement could be justified in any case).

The statute is narrowly limited and has a quite specific purpose:

> A United States marshal and his deputies, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof. 28 U.S.C. §570. (Emphasis supplied)

Clearly this provision is applicable only to assist marshals in the execution of their duties in executing federal laws within their jurisdiction. In fact, a marshal's powers and duties even under federal law are extremely narrow:

28 U.S.C. §569:

> (a) The United States marshal of each district is the marshal of the district court and of the court of appeals when sitting in his district, and of the Customs Court holding sessions in his district elsewhere than in the Southern and Eastern Districts of New York, and may, in the discretion of the respective courts, be required to attend any session of court.
>
> (b) United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, including those of the courts and Government of the Canal Zone, and command all necessary assistance to execute their duties.
>
> (c) The Attorney General shall supervise and direct United States marshals in the performance of public duties and accounting for public moneys. Each marshal shall report his official proceedings, receipts and disbursements and the condition of his office as the Attorney General directs.

And see 18 U.S.C. §3053 authorizing marshals to arrest for federal crimes without warrants.

Section 570 obviously refers back to §569 as its antecedent, and is designed to facilitate the execution of the duties described in 28 U.S.C. §569(b) and 18 U.S.C. §3053 within the territory of a state. It manifestly was not intended to render all deputy marshals into deputy sheriffs or to provide them with a roving commission to take upon themselves the execution and enforcement of state laws. Here there is no pretense that deputy Cheney was involved in the execution or enforcement of any federal law, duty, writ, order or other process. (So-called "citizen's arrests" of inebriates were

omitted from the Minnesota inebriacy statute; elsewhere, in Minn. Stat. §253A.07, is provided the machinery whereby private citizens may accomplish the custody and treatment of persons in need of it; it is judicial commitment machinery, designed to position a neutral magistrate to make the determination.) "Peace officers" as defined in the act, and only such peace officers, are authorized to do this upon a temporary basis in cases of public intoxication, and only by methods carefully distinguished from the criminal process. See State v. Fearon, 283 Minn. 90, 166 N.W.2d 720 (1969); Witte v. Haben, 131 Minn. 71, 154 N.W. 662 (1915).

The Court of Appeals held that "Cheney could reasonably infer that appellant was under the strong influence of some drug other than alcohol, " that it was "necessary for his own protection to determine whether appellant was carrying any dangerous weapons," and that this would "satisfy the requirements of Terry v. Ohio, 392 U.S. 1 (1968)." Opinion, p. 4. This holding misconstrues and expends the rule of Terry to such a degree that the opinion, if allowed to stand, will justify the detention and search of any person intoxicated in a public place, contrary to the Fourth Amendment.

The Terry doctrine, carefully circumscribed in the opinion itself, is founded upon the necessity to allow investigation of suspicious conduct, and protection of the officers doing so, where "articulable facts" short of probable cause justify the "seizure" of a person. 392 U.S. at 21-22. Never until now (so far as our research discloses) has mere intoxication been held to constitute "articulable facts" sufficient to satisfy Terry.

The ramifications of the holding are obvious and sinister: the Fourth Amendment does not apply to intoxicated persons; law officers are free to stop, question, and frisk any person who appears to be intoxicated, and to pursue the fruits of that initial intrusion with impunity. Given the ubiquitous availability of intoxicants, and the subjectivity of the observation of intoxication, this marks a truly extraordinary inroad into the Fourth Amendment sanctuary.

At stake here is more than a single drug conviction balanced against a single defendant's Fourth and Fifth Amendment rights, though those are serious enough concerns. Here we have an uncommon congeries of circumstances which, if sanctioned, presage a new and dangerous avenue of intrusion into our diminishing sphere of privacy. Mr. Justice Brandeis's fine words in Olmstead v. United States, 277 U.S. 438, 478 (1927) (dissenting), deserve periodic reiteration, and they are appropriate here:

> The makers of our Constitution . . . . conferred, as against the government, the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the 4th Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the 5th.

II. THE WARRANTLESS AND FORCIBLE OPENING OF THE LOCKED BRIEFCASE AT THE POLICE STATION WHEN THE PETITIONER WAS IN CUSTODY WAS UNREASONABLE UNDER THE FOURTH AMENDMENT.

The Court of Appeals, having held that the marshal made a valid investigatory stop, which resulted in the discovery of a small amount of marijuana, (a misdemeanor in Minnesota), then held that probable cause existed to believe the briefcase Mr. Schleis was carrying contained contraband and the delayed warrantless search of the briefcase at the station was reasonable under United States v. Edwards, 415 U.S. 800 (1974).

Edwards, a 5-4 decision, is hardly controlling, however, for there the legality of the arrest for a felony was unchallenged, and the property taken was not from a locked and secured briefcase, but the clothing the accused was wearing. In the present case, a man is taken into custody merely because he appears intoxicated; he is frisked in public; money and a small quantity of suspected marijuana is found (which could lead to a state misdemeanor charge); he is jailed, and his clothes searched, but even then the local officer is undecided whether to take him to a hospital for

detoxification or to hold him for the misdemeanor; then the briefcase is forcibly opened, disclosing suspected cocaine. No warrant was sought.

The Edwards majority emphasized that the decision did not mean that the Fourth Amendment's warrant clause "is never applicable to post-arrest seizures of the effects of an arrestee." 415 U.S. at 778. The present record provides an opportunity for the Court to clarify the criteria which still render the Fourth Amendment operative; unlike Edwards, here the initial detention, the necessity for a frisk, the taking into custody and the ultimate existance of probable cause were all most questionable; it is precisely in such marginal circumstances that the intervention of a neutral and detached magistrat is essential. The Court of Appeals' opinion will tend to encourage pretextual stops and frisks of allegedly intoxicated persons and effects.

For this reason, too, this Court should review the important questions raised by the opinion below.

Conclusion

For these reasons a writ of certiorari should issue to review the opinion of the Court of Appeals.

Respectfully submitted,

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BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 543 F. 2d 59.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1976. The petition for a writ of certiorari was filed on November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pat down search and subsequent arrest of petitioner were lawful.

2. Whether the warrantless, probable cause search of petitioner's locked briefcase at the police station, shortly after his arrest, violated the Fourth Amendment.

STATEMENT

After a non-jury trial on stipulated facts in the United States District Court for the District of Minnesota, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment to be followed by a special parole term of ten

years. The court of appeals affirmed (Pet. App.).

On November 17, 1974, Leon Cheney, an off-duty Deputy United States Marshal, was leaving a restaurant in Burnsville, Minnesota, when he observed petitioner walking toward the restaurant. After weaving and stumbling at the restaurant foyer, petitioner made several attempts to place a call from a public telephone, but he fumbled with the coin in the slot and was unable to dial. As Cheney entered the foyer, petitioner was leaning against the telephone clutching a briefcase and his head was bobbing and weaving. Cheney approached petitioner and noticed that his eyes were dilated and staring, although Cheney detected no odor of alcohol on petitioner's breath. Moreover, petitioner's responses to Cheney's questions were virtually inaudible. Cheney therefore concluded that petitioner was under the influence of something other than liquor (T. 6-12).[1/]

Cheney asked petitioner to step outside with him. Before leaving the foyer, however, Cheney attempted to identify himself to petitioner as a deputy marshal and to read petitioner his Miranda rights. Cheney also had his wife call the local police department, because he believed that petitioner might require treatment under the local public welfare law. Once outside the restaurant, Cheney took precautions for his own personal safety by placing petitioner's hands on the hood of a car and patting him down for weapons. In the course of the frisk, Cheney removed a large bulky wallet from petitioner's hip pocket and threw it on the hood of the car.[2/] The wallet opened and revealed a large amount of currency and a small plastic bag that appeared to contain marihuana (T. 14-19, 36).

When a police officer arrived at the scene, Cheney showed him the evidence that he had discovered. The officer recalled that approximately a year earlier another police officer had pointed out

1/ "T." refers to the transcript of the suppression hearing.

2/ Cheney knew from his training that objects the size of petitioner's wallet had been used to conceal weapons (T. 17-18).

petitioner to him as a drug dealer. Petitioner was then arrested. Since a crowd was gathering, petitioner was taken to the police station before a search was conducted. At the station, a search of petitioner's clothing revealed a plastic medicine bottle containing cocaine. In addition, inside petitioner's briefcase the police found more than two pounds of cocaine in plastic bags (T. 21-22, 24, 40).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the pat-down search that led to the discovery of the marihuana was unlawful. The mistaken premise of petitioner's argument, however, is that Cheney frisked him because of his "mere intoxication" (Pet. 9) in public and without any reason to believe that petitioner represented a potential danger to Cheney's personal safety. On the contrary, the court of appeals concluded that Cheney's observations of petitioner's condition justified a brief investigatory stop and that, under the circumstances, it was reasonable for Cheney's "own protection to determine whether [petitioner] was carrying any dangerous weapons" (Pet. App. 4). See Terry v. Ohio, 392 U.S. 1.

The court of appeals' conclusions are amply supported by the record. Cheney recognized that petitioner was under the strong influence of a drug other than alcohol. As a federal law enforcement officer empowered to make warrantless arrests (see 18 U.S.C. 3503), Cheney properly detained petitioner momentarily for further investigation as to whether he was in unlawful possession of a controlled substance. See 21 U.S.C. 844. He then was permitted to take reasonable precautions against the possibility that petitioner was carrying a concealed weapon and that, because of petitioner's evident involvement with drugs and his unstable condition, petitioner might be a threat to his safety. Adams v. Williams, 407 U.S. 143, 146. As the court of appeals noted (Pet. App. 4), the manner of the search was not unduly intrusive; Cheney patted down petitioner's outer clothing and removed only the bulky object in petitioner's pocket -- an

object that Cheney recognized from his training as capable of concealing a weapon. When the object, a wallet, fell open and revealed marihuana, probable cause existed for petitioner's arrest, and the arrival of a police officer who recognized petitioner as a drug dealer strengthened this justification.

2. Petitioner contends (Pet. 10-11) that the opening of his locked briefcase by the police without a warrant was unconstitutional. The court of appeals held (Pet. App. 5-6), correctly in our view, that in light of petitioner's antecedent arrest for possession of drugs, the officers' indisputable right to seize the briefcase, and the existence of probable cause to believe that the briefcase contained contraband, any justifiable expectation of privacy that petitioner held with regard to the contents of the briefcase had disappeared and the warrantless search was reasonable under the Fourth Amendment. See United States v. Edwards, 415 U.S. 800, 802-804; Draper v. United States, 358 U.S. 307, 314.[3/]

Although we therefore believe that the court below properly rejected petitioner's claims, we recognize that the issue presented in this case is similar to that in United States v. Chadwick, No. 75-1721, certiorari granted, October 4, 1976. Chadwick involves the question whether a search warrant is required before agents may open a locked footlocker that is properly in their possession following an arrest and that they have probable cause to believe contains contraband. Because they are frequently within the "immediate control" of a person at the time of his arrest, small hand-carried objects such as a briefcase are arguably distinguishable from footlockers, and the lower courts have repeatedly upheld the warrantless search of such objects as incident to lawful arrest. See, e.g., United

3/ Although petitioner appears to argue (Pet. 10) that there was no probable cause for the seizure or search of the briefcase, the discovery of the marihuana, petitioner's history as a drug dealer, and the removal of a bottle containing cocaine from his clothing unquestionably gave the police reason to believe that the briefcase contained narcotics. The lower court's determination of this issue does not, in any event, warrant further review.

States v. Giles, 536 F. 2d 136 (C.A. 6); United States v. Edmonds, 535 F. 2d 714 (C.A. 2); United States v. Patterton, 519 F. 2d 603 (C.A. 1), certiorari denied, 423 U.S. 987; United States v. Mehciz, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974. While that rationale is also applicable here, the Court may nevertheless deem it appropriate to defer disposition of this petition pending the decision in Chadwick.

Respectfully submitted.

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